Muhammed bin Hassan v Public Prosecutor

FEDERAL COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-122 OF 1993
CHONG SIEW FAI CJ (SABAH & SARAWAK), EDGAR JOSEPH JR FCJ AND NH CHAN JCA
9 DECEMBER 1997

Criminal Law *— Dangerous Drugs — Trafficking — Presumption — Whether the word 'deemed' in s 37(d) had the same meaning as the word 'found' in s 37 (da) — Whether presumption of possession under s 37(d) can be used to invoke the presumption of trafficking under s 37(da) — Dangerous Drugs Act (Malaysia) s 37(d) & (da)*

Criminal Procedure *— Report or certificate — Government chemist — Copy of the report served on the appellant before commencement of trial — Whether service of a copy of the report on the accused is, in itself, a bar to the prosecution from subsequently calling the maker of the report as a witness instead of relying on production of the report as substantive evidence — Criminal Procedure Code (FMS Cap 6) s 399*

The appellant was convicted in the High Court on a charge of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentenced to death under s 39B(2) of the same Act. The trial judge had found that the appellant had failed to raise any reasonable doubt on the defence case and had failed to rebut the statutory presumptions under s 37(d) and (da) of the Act on a balance of probabilities. The appellant appealed against the decision of the High Court on four grounds, namely that: (i) there was ambiguity in the chemist's (PW3) evidence as to whether the alleged drug was cannabis or Indian Hemp; (ii) the chemist's evidence was inadequate to prove that the subject matter of the charge was cannabis; (iii) the learned trial judge erred in law in invoking s 37(da) of the Act based on the presumption under s 37(d) of the same Act; and (iv) the learned trial judge erred in not distinctly and separately dealing with the presumption under s 37(da) of the Act.

Counsel for the appellant had conceded that the chemist did explain the tests he had conducted and that the plant materials he analysed were cannabis as defined in the Act. Further, the chemist report (exh P11) had been duly served on the appellant under s 399 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). Counsel for the appellant contended that having relied on s 399 of the CPC, it was not open to the prosecution to call the chemist as a witness. He submitted that s 399 postulated the chemist's report to be in writing, and that s 91 of the Evidence Act 1950 applied with the consequence that the chemist could not be permitted to testify on the four tests which he had conducted as they were not stated in his report.

Counsel for the appellant also contended that since the appellant was only deemed by the learned trial judge to be in possession of the cannabis under s 37(d) of the Act, the presumption of trafficking under s 37(da) could not be invoked in aid of the case for the prosecution. It was argued that in order to invoke s 37(da), there

must be an actual finding of possession as opposed to 'deemed' possession; otherwise there would be one presumption upon another presumption, which was not what the two subsections permitted. A

Held, allowing the appeal, quashing the conviction and substituting the death sentence with 16 years' imprisonment and 10 strokes of whipping: B

(1) Service of a copy of the report on the accused pursuant to s 399(i) of the CPC was, in itself, no bar to the prosecution from subsequently calling the maker of the report as a witness instead of relying on production of the report as substantive evidence. The prosecution in this case had decided to call PW3 rather than relying on his report, which it had served, as substantive evidence. By so doing, the prosecution had not only complied with the best evidence rule, but had also afforded the appellant the benefit of cross-examining PW3. The chemist report, even assuming that it was not tendered for the purpose of its being identified as an item handed to PW7, was no more than corroborative evidence affirming PW3's evidence that he had examined and analysed the suspected plant materials and found them to be cannabis under the Act. Therefore, the prosecution was not precluded from calling the chemist to prove its case in the ordinary way solely because it had served a copy of the report on the accused prior to the commencement of the trial (see pp 282C–H and 284H–I); *PP v Lam Peng Hoa & Anor* [1996] 5 MLJ 405 and *Saw Thean Teik v R* [1953] MLJ 124 distinguished. C D E

(2) The chemist had stated in his evidence that the plant materials which he had analysed were 'cannabis' as defined in the Act, without mentioning 's 2' and that he had conducted the tests which he explained. The chemist had testified that from the tests he had conducted, he detected the presence of resins and discovered that resins had not been extracted from the said plant materials, ie an ingredient of the definition of 'cannabis' in s 2 of the Act. Despite the omission of stating 's 2', on the evidence, there was no doubt that the plant materials seized from the appellant and analysed by PW3 were cannabis as defined under s 2 of the Act (see p 285B–D). F G

(3) To come to the presumptions of possession and knowledge under s 37(d) of the Act, one need only to arrive at a finding of having had 'in custody or under ... control anything whatsoever containing' the drug whereas to arrive at the presumption of 'trafficking' under s 37(da), a finding of being 'in possession' of the drug is necessary. It would therefore be unduly harsh and oppressive to construe the automatic application of presumption upon presumption. Such a construction ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which here is not. Therefore, to constitute 'possession' under s 37(da) of the Act, so as to be H I

capable of forming one of the ingredients thereunder giving rise to the presumption of trafficking, there must be an express affirmative finding, not only a legal presumption, of possession as understood in criminal law, based on evidence. The word 'found' in s 37(d) must bear the same meaning as the word 'found' in s 37(da). Both require evidential materials in attaining proof thereof and are different from the word 'deemed' employed in s 37(d) (see pp 288I, 289A–C and 291G–H).

Moreover, to read the presumption of possession provided in s 37(d) into s 37(da) so as to invoke against an accused a further presumption of trafficking would not only be ascribing to the phrase 'found in possession' in s 37(da) a meaning wider than it ordinarily bears but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused. Any ambiguity in s 37(da) should be resolved in favour of the accused by placing the burden of proving possession of the substances involved on the prosecution. The trial judge had therefore erred in law by using the presumption of possession under s 37(d) of the Act to invoke the presumption of trafficking under s 37(da) thereof (see pp 291H–I and 292B, D).

[Bahasa Malaysia summary

Perayu telah disabit di Mahkamah Tinggi atas pertuduhan pengedaran dadah di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dan dijatuhkan hukuman mati di bawah s 39B(2) Akta yang sama. Hakim perbicaraan mendapati bahawa perayu telah gagal menimbulkan apa-apa keraguan munasabah atas kes pembelaan dan telah gagal mematahkan anggapan statutori di bawah s 37(d) dan (da) Akta tersebut atas imbangan kebarangkalian. Perayu merayu terhadap keputusan Mahkamah Tinggi berdasarkan empat alasan, iaitu bahawa: (i) terdapat ketaksaan dalam keterangan ahli kimia (PW3) mengenai sama ada dadah yang dikatakan adalah ganja atau Hemp dari India; (ii) keterangan ahli kimia tidak memadai bagi membuktikan bahawa perkara subjek pertuduhan ialah ganja; (iii) hakim perbicaraan yang arif terkhilaf dalam undang-undang dalam menggunakan s 37(da) Akta tersebut berdasarkan anggapan di bawah s 37(d) Akta yang sama; dan (iv) hakim perbicaraan yang arif terkhilaf dalam tidak mengendalikan anggapan di bawah s 37(da) Akta tersebut secara jelas dan berasingan.

Peguam perayu telah bersetuju bahawa ahli kimia memang telah menjelaskan ujian-ujian yang dijalankannya dan bahawa bahan tumbuhan yang dikajinya adalah ganja sepertimana ditakrifkan dalam Akta tersebut. Selanjutnya, laporan ahli kimia (eks P11) telah pun disampaikan seperti yang sepatutnya pada perayu di bawah s 399 Kanun Acara Jenayah (NMB Bab 6) ('KAJ'). Peguam perayu menghujahkan bahawa setelah bergantung pada s 399 KAJ, ia tidak terbuka kepada pihak pendakwa untuk memanggil ahli kimia sebagai seorang saksi. Beliau berhujah bahawa s 399 mempostulatkan laporan

ahli kimia haruslah dalam bentuk bertulis, dan bahawa s 91 Akta Keterangan 1950 terpakai dengan akibat bahawa ahli kimia tidak boleh dibenarkan memberi keterangan atas empat ujian yang telah dijalankannya kerana mereka tidak dinyatakan dalam laporannya. A

Peguam perayu juga berhujah bahawa oleh kerana perayu hanya dianggap oleh hakim perbicaraan yang arif sebagai memiliki ganja di bawah s 37(d) Akta tersebut, anggapan pengedaran di bawah s 37(da) tidak boleh digunakan bagi membantu kes pihak pendakwa. Adalah dihujahkan bahawa bagi membolehkan s 37(da) terpakai, milikan sebenar mestilah didapati bertentangan dengan milikan yang 'dianggap'; jikalau tidak akan terdapat satu anggapan bersandar pada satu lagi anggapan, yang bukanlah apa yang dibenarkan oleh dua subseksyen itu. B C

Diputuskan, membenarkan rayuan, membatalkan sabitan dan mengganti hukuman mati dengan hukuman penjara 16 tahun dan 10 sebatan: D

(1) Penyampaian sesalinan laporan ke atas tertuduh menurut s 399(i) KAJ, dengan sendirinya, tidak menghalang pihak pendakwa daripada kemudiannya memanggil pembuat laporan sebagai saksi dan bukannya bergantung pada pengemukaan laporan sebagai bukti kukuh. Pihak pendakwa dalam kes ini telah memutuskan untuk memanggil PW3 daripada bergantung pada laporannya, yang ia telah sampaikan, sebagai bukti kukuh. Dengan berbuat demikian, pihak pendakwa bukan sahaja telah mematuhi rukun keterangan paling baik, tetapi juga telah menawarkan manfaat memeriksa balas PW3 kepada perayu. Laporan ahli kimia, sekalipun menganggap bahawa ia tidak dikemukakan untuk tujuan dikenal pasti sebagai benda yang diserahkan kepada PW7, cumalah sekadar keterangan menyokong yang mengesahkan keterangan PW3 bahawa beliau telah memeriksa dan mengkaji bahan tumbuhan yang disyaki dan mendapati ia adalah ganja di bawah Akta tersebut. Maka, pihak pendakwa tidak terhalang daripada memanggil ahli kimia untuk membuktikan kesnya dalam cara biasa semata-mata kerana ia telah menyampaikan sesalinan laporan ke atas tertuduh sebelum permulaan perbicaraan (lihat ms 282C–H dan 284H–I); *PP v Lam Peng Hoa & Anor* [1996] 5 MLJ 405 dan *Saw Thean Teik v R* [1953] MLJ 124 dibeza. E F G

(2) Ahli kimia telah menyatakan dalam keterangannya bahawa bahan tumbuhan yang dikajinya adalah 'ganja' seperti yang ditakrifkan dalam Akta tersebut, tanpa menyebut 's 2' dan bahawa dia telah menjalankan ujian yang dijelaskannya. Ahli kimia telah memberi keterangan bahawa daripada ujian yang dijalankannya, beliau telah mengesan kehadiran resin dan mendapati bahawa resin tidak dikeluarkan daripada bahan tumbuhan tersebut, iaitu satu unsur takrifan 'ganja' dalam s 2 Akta tersebut. Meskipun 's 2' tidak dinyatakan, atas keterangan, tiada keraguan bahawa bahan tumbuhan yang telah disita daripada perayu dan dikaji oleh PW3 H I

adalah ganja sebagaimana ditakrifkan di bawah s 2 Akta tersebut (lihat ms 285B–D).

(3) Bagi mencapai anggapan milikan dan pengetahuan di bawah s 37(d) Akta tersebut, seseorang hanya perlu mencapai keputusan 'dalam jagaannya atau di bawah pengawalannya apa-apa sahaja yang mengandungi' dadah manakala untuk mencapai anggapan 'pengedaran' di bawah s 37(da), keputusan didapati 'ada dalam milikan' dadah adalah perlu. Oleh itu adalah terlalu keras dan menindas untuk mentafsirkan pemakaian automatik anggapan pada anggapan. Tafsiran sedemikian patut diterimapakai hanya sekiranya, pada susunan kata kedua-dua subseksyen, hasrat Parlimen seperti ini adalah jelas, yang tidak begitu di sini. Maka, untuk membentuk 'milikan' di bawah s 37(da) Akta tersebut, supaya membentuk satu daripada unsur di bawahnya bagi membangkitkan anggapan pengedaran, mesti terdapat keputusan mengiakan yang nyata, bukan sahaja satu anggapan sah, atas milikan sebagaimana yang difaham dalam undang-undang jenayah, berdasarkan keterangan. Perkataan 'didapati' dalam s 37(d) mesti membawa makna yang sama dengan 'didapati' dalam s 37(da). Kedua-dua menghendaki bahan keterangan dalam memperolehi bukti ke atasnya dan berbeza daripada perkataan 'dianggap' yang digunakan dalam s 37(d) (lihat ms 288I, 289A–C dan 291G–H).

Tambahan pula, untuk membaca anggapan milikan yang diperuntukkan dalam s 37(d) ke dalam s 37(da) supaya anggapan pengedaran yang lanjut dapat digunakan terhadap seorang tertuduh bukan sahaja memberikan makna yang lebih luas daripada yang biasa kepada ungkapan 'didapati ada dalam milikannya' dalam s 37(da) tetapi juga bertentangan dengan prinsip tafsiran yang mantap atas statut keseksaan dan terlalu keras dan menindas terhadap tertuduh. Sebarang ketaksaan dalam s 37(da) harus diselesaikan memihak kepada tertuduh dengan meletakkan beban membukti milikan bahan-bahan terlibat pada pihak pendakwa. Dengan itu, hakim perbicaraan telah terkhilaf di sisi undang-undang dengan menggunakan anggapan milikan di bawah s 37(d) Akta tersebut bagi menggunakan anggapan pengedaran di bawah s 37(da) (lihat ms 291H–I dan 292B, D).]

Notes

For cases on the Dangerous Drugs Act 1952 s 37(d) and (da), see 4 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 49–52.

For cases on report or certificate by Government chemist, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2083–2092.

Cases referred to

Black-Clawson International Ltd v Papierwerke AG [1975] 2 WLR 513 (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345 (refd)

Liew Sai Wah v PP [1968] 2 MLJ 1 (refd)
Low Kok Wai v PP [1994] 1 SLR 676 (refd)
Magor and St Mellons Rural District Council v Newport Corp [1952] AC 189 (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169 (refd)
Mohd Yusof bin Said v PP [1996] 1 MLJ 640 (refd)
Pepper (Inspector of Taxes) v Hart [1992] 3 WLR 1032 (refd)
PP v Adetunji Adeleye Sule [1993] 2 MLJ 70 (refd)
PP v Lam Peng Hoa & Anor [1996] 5 MLJ 405 (distd)
PP v Leong Kuai Hong [1981] 1 MLJ 246 (refd)
R v Cuthbertson [1980] 2 All ER 401 (refd)
Saw Thean Teik v R [1953] MLJ 124 (distd)
Stephenson v Higginson (1851) 3 HL Cas 638 (refd)

Legislation referred to

Criminal Procedure Code (Cap 21) s 427
Criminal Procedure Code (FMS Cap 6) s 399(i), (ii)
Dangerous Drugs Act 1952 ss 2, 6, 37(d), (da), 39B(1)(a), (2)
Evidence Act 1950 ss 91, 92
Misuse of Drugs Act (Ch 185) ss 17, 18(1), (2) [Sing]
Misuse of Drugs Act 1971 [UK]

Appeal from: Criminal Trial No 47–9 of 1991 (High Court, Kuala Lumpur)

Karpal Singh (*Karpal Singh & Co*) for the appellant.
Azahar bin Mohamed and *Ganesan Somasundram* (Attorney General's Chambers) for the respondent.

Chong Siew Fai CJ (Sabah & Sarawak) (delivering the judgment of the court): This appeal was against the decision of the High Court at Johor Bahru in which the appellant was convicted on a charge of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentenced to death under s 39B(2) thereof. At the conclusion of the hearing, we unanimously allowed the appeal, quashed the conviction and set aside the death sentence. As conceded on behalf of the appellant, which we considered justified, we substituted therefor a conviction under s 6 of the Act and, after hearing the plea in mitigation, sentenced the appellant to imprisonment for a term of 16 years with effect from the date of his arrest and 10 strokes of whipping. We had then indicated that the grounds of the judgment would be given later, which we now do.

The charge against the appellant reads:

> Bahawa kamu pada 31 Oktober 1990, jam lebih kurang 7.45 malam, di kawasan rumah setinggan di Jalan Kubur, Kampong Bakar Batu, di dalam daerah Johor Bahru, dalam Negeri Johor, telah didapati mengedar dadah berbahaya iaitu cannabis, sejumlah berat 1,784.8gm, dan dengan itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.

Case for the prosecution

Briefly, the case for the prosecution is this.

Acting on information received on 31 October 1990 at 7pm, detective police constable Hairuman bin Ihsan (PW5) together with detective police constable Haron bin Pandak (PW6) and one DPC Sharif went to a squatter area in Kampong Bakar Satu, Jalan Kubur, Johor Bahru. Upon arrival at 7.45pm, the police party entered a lane between some houses where they met the appellant carrying a package (exh P6) in his right hand. PW5 identified himself as a police officer. This prompted the appellant to take flight and, in so doing, dropped the package (exh P6) which he carried.

The policemen immediately took steps to prevent the appellant from escaping, resulting in a scuffle between the policemen and the appellant. The appellant was finally overpowered and arrested. PW5 retrieved the package (exh P6) dropped by the appellant. An examination of the package in the presence of the appellant revealed it to contain two smaller plastic packages (exhs P7 and P8). Upon opening the two packages, PW5 found each to contain dried leaves which he believed to be cannabis. The appellant was then taken to PW5's office at the police headquarters of Johor Bahru. At 9.35pm the same night, PW5 handed over the appellant and the said packages to PW7, the investigating officer of this case.

PW7 testified that on 5 November 1990 at 9am, he sent the packages to PW3, the chemist, and received them back from the chemist on 20 March 1991 at about 11am.

In his evidence, PW3 testified that to determine whether the dried leaves in the two packages (exhs P7 and P8) were cannabis, he conducted the four standard tests which were:

(i) Physical examination;

(ii) Microscopic examination;

(iii) Duquenois levine test; and

(iv) Thin layer chromatography test.

From the first test, PW3 discovered that all the plant materials from the two packages were of the genus cannabis. The second test, that is the microscopic examination of the said plant materials, revealed that there were a lot of resins in their original form and the plant materials had the same morphological features as those found in cannabis. From the duquenois levine test, PW3 found the presence of 'cannabenoid' as to be found in cannabis, and from the thin layer chromatography test, he discovered that the cannabenoid contained similar active ingredients as found in cannabis.

It was not in dispute that a copy of the chemist's (PW3's) report (exh P11) on the examination and analysis of the aforesaid plant materials was served on the appellant in the Johor Bahru prison on 28 July 1991.

On the above evidence, the learned trial judge held that a prima facie case had been made out against the appellant and that the prosecution had also successfully raised the statutory presumptions under s 37(d) and (da)

of the Act. The learned trial judge then called on the appellant to enter upon his defence.

Defence case

The appellant elected to give evidence under oath. Briefly, his defence was one of guarding the package exh P6 (which he called the bag) without knowledge of the contents therein. He testified that on the night in question at 7.20pm, his friend, one Markan, came to his house in Kampong Bakar Batu asking him to accompany Markan to meet another friend, Haizam. The appellant said when he came out of his house, Haizam was already outside, carrying a bag. He followed the two of them and arrived at the squatter area where they asked him to guard Haizam's bag after Haizam had taken a plastic package therefrom, saying that they (Haizam and Markan) wanted to meet another friend of theirs. Haizam and Markan then left. The appellant claimed that it was whilst he was standing beside the bag waiting for them that the police arrived and arrested him. After the arrest, he was handcuffed and taken to sit beside a car. Shortly thereafter, Haizam was also brought by the police to the car. Both of them were then taken to the police station. The appellant denied any knowledge of the contents of the plastic bag and denied having seen what was inside it as it was dark.

Under cross-examination, the appellant said he came to know Haizam only that night. He admitted that his relationship with them was good and saw no reason why they would frame him. The appellant also stated that when the police arrested him, the plastic bag was about six to seven feet away from him and had been left with him for about 15 minutes.

Findings of the trial judge

In his judgment, the learned trial judge disbelieved the appellant. He was of the view that the defence was an afterthought and that Markan and Haizam were fictitious persons and were the products of the appellant's imagination since PW5 and PW6 were never cross-examined about their existence.

Secondly, the learned trial judge considered it improbable that the appellant would have helped look after Haizam's bag at the latter's request since he had only met Haizam that very night. The learned trial judge found it hard to accept that the appellant did not suspect anything amiss about the said bag especially when Haizam had taken therefrom a plastic package before leaving the bag with the appellant.

Thirdly, the learned trial judge found PW5 and PW6 to be witnesses of truth, having no reason to lie in court and to frame the appellant.

On the totality of the evidence, the learned trial judge found that the appellant had failed to raise any reasonable doubt on the defence case and had failed to rebut the statutory presumptions under s 37(d) and (da) on a balance of probabilities.

The appeal

On behalf of the appellant, four grounds of appeal were advanced before us. They may be stated as follows:

(1) that there was ambiguity in the chemist's (PW3's) evidence as to whether the alleged drug was cannabis or Indian Hemp;

(2) that the chemist's evidence was inadequate to prove that the subject matter of the charge was cannabis;

(3) that the learned trial judge erred in law in invoking s 37(da) of the Act based on the presumption under s 37(d) of the same Act; and

(4) that the learned trial judge erred in not distinctly and separately dealing with the presumption under s 37(da) of the Act.

Before us, Mr Karpal Singh, learned counsel for the appellant took the above grounds (1) and (2) together and then grounds (3) and (4) separately. We would do likewise.

Grounds (1) and (2)

Mr Karpal Singh conceded that the chemist did explain the four tests he had conducted and did say that the plant materials which he analysed were cannabis as defined in the Act. It was also not disputed that the chemist report (exh P11) had been duly served on the appellant under s 399 of the Criminal Procedure Code (FMS Cap 6) ('the CPC'). Counsel, however, contended that having thus relied on the said s 399 (ie service of a copy of the report on the appellant), it was not open to the prosecution to call the chemist as a witness, citing *PP v Lam Peng Hoa & Anor* [1996] 5 MLJ 405 and *Saw Thean Teik v R* [1953] MLJ 124 in support. Mr Karpal Singh also submitted that the said s 399 postulated the chemist's report to be in writing, and that s 91 of the Evidence Act 1950 applied with the consequence that the chemist could not be permitted to testify on the four tests which he had conducted as they were not stated in his report.

On the other hand, the learned deputy public prosecutor, so far as was relevant to the issue in point, submitted to the effect that to render ss 91 and 92 of the Evidence Act 1950 applicable, the matter must be 'required by law' to be reduced in writing, and that a chemist report was not required by law to be so reduced. He further contended that by the ejusdem generis rule, the chemist's report did not come within the ambit of the said ss 90 and 91.

The relevant parts of s 399(i) and (ii) of the CPC reads:

> (i) Any document purporting to be a report under the hand of any of the person mentioned in subsection (ii) of this section upon any person, matter or thing examined or analysed by him ... may be given in evidence in any inquiry, trial or other proceeding under this Code unless such person ... shall be required to attend as a witness —
>
> (a) by the Court; or

(b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:

Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy thereof to the accused not less than ten clear days before the commencement of the trial.

(ii) The following are persons to whom the provisions of this section apply:

(c) chemists in the employment of any Government in the Federation or the Government of Singapore; ... .

With respect, we did not consider that the prosecution was precluded from calling PW3, the chemist (the maker of the report exh P11), to prove its case in the ordinary way solely because it had served a copy of the report on the accused prior to the commencement of the trial pursuant to s 399(i) of the CPC. In other words, service of a copy of the report on the accused pursuant to the said s 399(i) is, in itself, no bar to the prosecution from subsequently calling the maker of the report as a witness instead of relying on production of the report as substantive evidence. Section 399(i) merely renders permissible the admission in evidence the reports of the categories of persons set out in sub-s (ii) thereof (PW3 belonged to one of such categories) without calling the makers as witnesses provided that the precondition of service of copies of the reports as laid down in the said s 399(i) had been duly complied with. It merely enables the report to be used but does not make it obligatory for the prosecution to make the report substantive evidence simply because it had served a copy thereof upon the accused in pursuance of the said s 399(i). The object of dispensing with the calling of the categorized persons as witnesses was probably to avoid the expenses, delay or inconvenience which would be caused if they were to testify in court in person. But even then, such persons would have to be called as witnesses if required by court or if needed, upon due notification, by the accused. In this case presently under appeal, an important point to note is that the prosecution decided to call PW3 rather than relying on his report exh P11, which it had served, as substantive evidence. Had the prosecution persisted to act under the said s 399(i) and tendered the report in court to establish that part of its case, then the rule might apply that the contents of the report must be proved by the report itself, and not by parol evidence; but that was not what the prosecution did. In fact, the prosecution called PW3, the maker of the report; by so doing, the prosecution not only had complied with the best evidence rule — the rule that the best evidence of which the subject (or the nature of the thing) is capable ought to be produced — but had also afforded the appellant the benefit of cross-examining PW3, an opportunity of which erstwhile counsel for the appellant had indeed availed himself in this case.

Furthermore, we saw nothing improper in the production of the report (exh P11) by PW3 as maker thereof in the course of his giving evidence in court in this case. A perusal of the appeal record (pp 10–17) would reveal that the primary evidence of PW3 came from his oral testimony. It is clear from the oral evidence that the report (exh P11) was

produced not even as corroborative evidence but was merely mentioned and identified as one of the items handed over to the investigating officer PW7. This is what PW3 said:

> Saya juga serahkan laporan kimia kepada beliau ... . Ini dia laporan kimia saya (P11). (Page 15 of the appeal record.)

Moreover, the defence did not at all cross-examine on the report.

In point of law, where a maker of a report is called as a witness, there is nothing to prevent him from tendering his report for the purpose of corroborating his own evidence though, as we have stated earlier, that was not the purpose for which exh P11 was tendered by PW3 in this case. In *Saw Thean Teik v R*, which dealt with s 427 of the Criminal Procedure Code (Cap 21) which was in pari materia with s 399 of our present CPC (except for one category of persons in sub-s (ii)), Spenser Wilkinson J said (at p 125):

> When a Medical Offcer is giving oral evidence then, of course, any notes which he may have made at the time of his examination, he can refer to refresh his memory. Moreover, if his report is made at about the time when his examination took place, the report could be put in, not as primary evidence of its contents but to corroborate the oral evidence already given under s 157 of the Evidence Ordinance.

And (at p 126):

> Technically, however, it is wrong for a witness in a criminal case to produce a report as a substitute for oral evidence. Clearly, if the witness is in the witness box, the best evidence is his oral evidence as to what he saw or discovered (see s 60 of the Evidence Ordinance). Where witnesses of this kind are brought to court, their reports should only be used, if at all, either to refresh memory or as corroboration.

Similarly in *PP v Lam Peng Hoa & Anor,* Kang Hwee Gee J, applying *Saw Thean Teik v R*, said (at p 412):

> It is trite law that if a chemist is called as a witness to testify on matters pertaining to his analysis of the drug, the chemist report prepared by him would not be admissible, save that it may be tendered not as substantive evidence of its contents, but as corroboration of his oral evidence in court under s 157 of the Evidence Act.

On the issue presently under consideration, *PP v Lam Peng Hoa & Anor*, so far as from the relevant facts that may be gathered in the judgment of Kang Hwee Gee J, is distinguishable. There, the chemist's report was tendered as conclusive or substantive evidence of the contents therein stated. Subsequently, attempt was made to call the chemist to explain the conduct of her analysis in the drug or as stated in the heading of the judgment appearing at p 412: 'TO CALL CHEMIST TO CLARIFY REPORT'.

As regards *Saw Thean Teik v R*, we also did not find it of assistance. That was a dangerous driving case and the issue was the evidence of intoxication. Such evidence was purported to have come from a medical officer and a chemist. Both were called as witnesses and both tendered

their respective reports which, for reasons not relevant for our purpose, Spenser Wilkinson J held inadmissible. Unfortunately, it is not clear from the judgment what exactly or substantially were their oral testimonies in court. However, it appears obvious that little, if any, was said in their oral evidence about the issue of intoxication. In coming to the conclusion lastly stated, we base on the following excerpts in the judgment:

(1) Respecting the medical officer

> The doctor's report was very much stronger than the report of the chemist and it is impossible to know what his evidence would have been had he depended entirely upon his recollection assisted by any notes he may have made at the time. (Page 125)

(2) Respecting the chemist

Spenser Wilkinson J, after holding that the chemist's report was inadmissible because the chemist was called as a witness and because of failure to serve the requisite notice under s 427 of the Criminal Procedure Code (Cap 21), said (at p 126):

> I do not attach much importance to this point, because I have no doubt that *if he had been properly examined, his evidence would have been identical with the contents of his report. Technically, however, it is wrong for a witness in a criminal case to produce a report as a substitute for oral evidence.* Clearly, if the witness is in the witness box the best evidence is his oral evidence as to what he saw or discovered (see s 60 of the Evidence Ordinance). Where witnesses of this kind are brought to court, their reports should only be used, if at all, either to refresh memory or as corroboration. (Emphasis added.)

In the instant case before us, the chemist's report exh P11 was, as we have earlier stated, produced as one of the items handed over to PW3 and not even for purpose of corroboration.

Briefly put, in our view:

(1) the fact that service of the notice of intention to produce the chemist's report under s 339(i) of the CPC, per se, would not preclude the prosecution from declining to tender the report in evidence pursuant to the said s 339(i) and calling the chemist PW3, as maker of the report, to give evidence at the trial instead;

(2) from the appeal record it is obvious that PW3 gave substantive evidence in his oral testimony in court and that the report (exh P11) was merely tendered as one of the items handed over by him to PW7; and

(3) that the chemist report, even assuming that it was not tendered for the purpose of its being identified as an item handed to PW7, was no more than corroborative evidence affirming PW3's evidence that he had examined and analysed the suspected plant materials and found them to be cannabis under the Dangerous Drugs Act 1952.

In the light of the above view that we take, it is unnecessary to discuss and rely on ss 91 and 92 of the Evidence Act 1950.

A The next question is whether the chemist's evidence was sufficient to prove that the subject-matter of the charge was cannabis. 'Cannabis' is defined in s 2 of the Act as to mean:

> any part of any plant of the genus cannabis from which the resin has not been extracted, by whatever name it may be designated.

B As stated earlier, Mr Karpal Singh conceded, and rightly so, that PW3, the chemist, had stated in his evidence that the plant materials which he had analysed was:

> 'cannabis' as defined in the Dangerous Drugs Act 1952,

C without mentioning 's 2' and that he had conducted the four tests which he explained. The chemist had also testified that from the four tests he had conducted, more particularly the microscopic test and the duquenois levine test, he detected the presence of resins and discovered that resins had not been extracted from the said plant materials, ie an ingredient of the definition of 'cannabis' in s 2 of the Act as stated above. Despite the D omission of stating 's 2', on the evidence, we entertained no doubt that the plant materials seized from the appellant and analysed by PW3 were cannabis as defined under s 2 of the Dangerous Drugs Act 1952: *Mohd Yusof bin Said v PP* [1996] 1 MLJ 640.

E We therefore saw no merit in grounds (1) and (2).

Ground (3)

Section 37(d) and the relevant part of s 37(da) of the Act provides:

> 37 In all proceedings under this Act or any regulation made thereunder —
>
> F ...
>
> (d) any person who is found to have had in custody or under his control *anything whatsoever containing* any dangerous drug shall, until the contrary is proved, be *deemed* to have been in possession of such drug and shall, until the contrary is proved, be *deemed* to have known the nature of such drug;
>
> G (da) any person who *is found* in possession of —
>
> ...
>
> (vi) 200 grammes or more in weight of cannabis,
>
> otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be H traffcking in the said drug; ... . (Emphasis added.)

In his judgment, the learned trial judge, after relating the evidence adduced by the prosecution as stated earlier herein, said:

> I Justera itu, setelah mendengar hujah-hujah yang dikemukakan oleh kedua-dua pihak, saya berpuas hati pendakwaan telah berjaya membuktikan satu kes prima facie terhadap tertuduh. Pendakwaan juga berjaya menimbulkan anggapan-anggapan statutori di bawah s 37(d) dan (da) Akta Dadah Berbahaya 1952 terhadap tertuduh. Tertuduh dipanggil membela diri.

[Translation:

After hearing the submissions presented by both parties, I was satisfed that the prosecution had established a prima facie case against the accused. The prosecution had also successfully raised the statutory presumptions under s 37(d) and (da) of the Dangerous Drugs Act 1952 against the accused. The accused was called to enter upon his defence.]

Then, the learned trial judge after dealing with the defence case, which he rejected, concluded:

Tertuduh juga gagal menyangkal anggapan-anggapan statutori di atas imbangan kebarangkalian. Sebaliknya, pendakwaan telah membuktikan kesnya tanpa sebarang keraguan munasabah. Tertuduh didapati bersalah dan dikenakan hukuman mati mandatori.

[Translation:

The accused also failed to rebut the statutory presumptions on balance of probabilities. On the other hand, the prosecution had established its case beyond reasonable doubt. The accused was found guilty and sentenced to death.]

It is necessary to bear in mind that the ensuing discussion of s 37(da) of the Act rests on the basis that the requirement of the minimum quantity as stipulated in the subsection has been fulfilled.

Mr Karpal Singh for the appellant, took exception to the two passages of the learned trial judge quoted above. He drew our attention to the words 'found in possession' in s 37(da) of the Act and contended that since the appellant was only *deemed* by the learned trial judge *to be in possession* of the cannabis under s 37(d) of the Act, the presumption of trafficking under s 37(da) could not be invoked in aid of the case for the prosecution. In other words, it was the contention for the appellant that in order to invoke s 37(da), there must be an actual finding of possession as opposed to 'deemed' possession; otherwise there would be one presumption upon another presumption, which was not what the two subsections permitted. As persuasive authorities, reference were made to ss 17 and 18(1) and (2) of the Misuse of Drugs Act (Ch 185) of Singapore, Revised Edition 1997 ('the Singapore Act') and the Singapore case of *Low Kok Wai v PP* [1994] 1 SLR 676.

The learned deputy public prosecutor argued otherwise. He submitted that the presumption of trafficking under s 37(da) could be properly invoked once a presumption of possession under s 37(d) had been established. He urged upon us not to depart from the past decisions of our courts on the double application of the presumptions of possession and trafficking. Among the cases of this court cited, *PP v Adetunji Adeleye Sule* [1993] 2 MLJ 70 warrants special mention. In that case, the accused was found in possession of a trunk in which heroin was discovered. It was held by the Supreme Court, on appeal, that he was deemed to be in possession of the drug and to have known the nature of the drug by reason of s 37(d) of the Act and was further presumed to be trafficking in the drug, by reason of s 37(da) thereof. In the course of arguments before us, doubt was expressed as to whether the point now canvassed before us (ie the

application of s 37(da) upon a finding of custody or control under s 37(d)) was raised in *PP v Adetunji Adeleye Sule*. Edgar Joseph Jr FCJ, a member of this panel, who was also on the panel in *PP v Adetunji Adeleye Sule* and delivered the judgment of the court, with an air commanding high respect, candidly confirmed that the point had not been argued in that appeal. Likewise, the learned deputy public prosecutor also fairly and frankly conceded that the point was never previously argued and decided. That being so, we see no purpose of discussing the other cases cited by the learned deputy public prosecutor, in relation to the point in issue. The concession of the learned deputy public prosecutor also explained why we ought to deal with the issue since it had been specifically raised.

The learned deputy public prosecutor further submitted, albeit vaguely, that the intention of Parliament was to render the automatic application of s 37(da) once s 37(d) of the Act had been successfully invoked, as illustrated in previous cases decided by our Malaysian courts. He also referred to the following excerpt in the statement of the then Deputy Minister of Law, En Rais Yatim, made in Parliament when moving the Dangerous Drug (Amendment) (No 2) Bill on 15 December 1976, as reported in the 'Parliamentary Debates' Jilid II Bil 69 col 7343 ('the Hansard'):

> Fasal 3 Rang Undang-undang Akta Dadah Berbahaya (Pindaan) (No 2) 1976 ini bertujuan juga membuat peruntukan supaya sesiapa juga yang memiliki satu ratus gram heroin atau seribu gram morphine atau lima kilogram candu atau dua ratus gram ganja atau lebih melainkan dengan kebenaran yang diberi oleh Ordinan ini atau mana-mana undang-undang bertulis, hendaklah dianggap, sehingga dibuktikan sebaliknya sebagai 'trafficking' dadah berbahaya. Anggapan ini akan banyak menolong pihak yang menguatkuasakan undang-undang ini.

The learned deputy public prosecutor submitted that the words 'found in possession' in s 37(da) must be construed to mean either actual or presumed possession in order to give efficacy to the intention of the Parliament in enacting s 37(da), ie to combat drug trafficking.

As regards the Singapore legislation and the case of *Low Kok Wai v PP*, the learned deputy public prosecutor urged upon us not to rely on them in view of the difference in the wordings of the statutes of the two countries.

In the alternative, the learned deputy public prosecutor contended that even without the aid of s 37(da), there was sufficient evidence in this case establishing that the appellant was in manual possession and with knowledge of the cannabis. He therefore submitted that the conviction ought to stand.

In deciding this issue, it is necessary, first and foremost, to bear in mind that both sub-ss (d) and (da) of s 37 of the Act, being penal provisions, must be strictly construed, and must not be extended beyond their clear meaning: *Liew Sai Wah v PP* [1968] 2 MLJ 1, *PP v Leong Kuai Hong* [1981] 1 MLJ 246. See also *Stephenson v Higginson* (1851) 3 HL Cas 638 where Lord Truro observed (at p 686):

> ... but in a penal enactment, where you depart from the ordinary meaning of the words used, the intention of the Legislature that those words should be understood in a more large or popular sense, must plainly appear.

And, in *R v Cuthbertson* [1980] 2 All ER 401 where a forfeiture provision in the Misuse of Drugs Act 1971 (English) was called for construction, Lord Diplock observed (at p 404):

> The fact that the section is a penal provision is in itself a reason for hesitating before ascribing to phrases used in it a meaning broader than that they would ordinarily bear.

The wordings of sub-ss (d) and (da) of s 37 are clear and unequivocal. That being so, their meanings must be determined from the language employed and the two subsections must be taken to mean exactly what they respectively say. Also, generally speaking, if the words in a statute admit of two interpretations, then they are not clear, and if one interpretation is more favourable to an accused than the other, the court will adopt the one more favourable to the accused.

Since the literal meanings of the two subsections are intelligible, they must not be extended on the ground that there has been a slip or a matter not provided for which should have been provided for. Any ambiguity or slip would be a matter for the legislature. In *Magor and St Mellons Rural District Council v Newport Corp* [1952] AC 189, Lord Simonds observed (at p 191):

> The duty of the court is to interpret the words that the legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited.
>
> If a gap is disclosed, the remedy lies in an amending Act.

In our view, there is a clear undeniable distinction between the word 'deemed' used in s 37(d) and the word 'found' employed in s 37(da) of the Act. The 'deemed' state of affairs in s 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody or control. Such presumptions as under s 37(d) (and, for that matter, the one under s 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s 37(d) by the prosecution), the court *must* in law draw a presumption in its favour (ie presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make. On the other hand, the word 'found' in the opening phrase of s 37(da) connotes a finding after a trial by the court.

Furthermore, the basic or primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s 37(d) of the Act and those required to raise 'presumed ... trafficking' under s 37(da) are different. To come to the presumptions of possession and knowledge under s 37(d), one

need only to arrive at a finding of having had 'in custody or under ... control anything whatsoever containing' the drug (as opposed to the drug itself) whereas to arrive at the presumption of 'trafficking' under s 37(da), a finding of being 'in possession' of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified). In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public prosecutor — a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.

In our view, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

As regards the submission of the learned deputy public prosecutor on the intention of Parliament, the correct approach, in our opinion, is to ascertain the meaning of the words employed by Parliament rather than the intention of Parliament. As Lord Reid observed in *Black-Clawson International Ltd v Papierwerke AG* [1975] 2 WLR 513 at p 517:

> We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said.

Respecting the Hansard quoted above and relied on by the learned deputy public prosecutor, it sought to introduce into the Act the provision of presumption of trafficking which might be invoked upon proof of possession of certain quantities or above of various types of the dangerous drugs, unless the contrary is proved. The original form of the present s 37(da), first enacted by way of the Dangerous Drugs (Amendment) (No 2) Act 1977 (which was subsequently further amended), was the result of that legislative effort. However, with respect, for the purpose of the present issue under consideration, we were unable to find any assistance from the quoted statement of the then Deputy Minister of Law; but, even if there was, we were unable to refer to or rely on it since the two subsections which we were called upon to construe, suffer no ambiguity or obscurity: *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345, *Pepper (Inspector of Taxes) v Hart* [1992] 3 WLR 1032.

We next considered the legislation and the case law of Singapore submitted before us, noting the difference in the wordings of the Singapore legislation compared to those of ours and therefore necessitated careful scrutiny, and further bearing in mind, of course, that the Singapore decision, even if relevant, was of mere persuasive value.

Section 17 of the Singapore Act

Before 15 February 1990, s 17 of the Singapore Act read:

17 Any person who is *proved or presumed to have had in his possession* more than — ... A

(c) 2 grammes of diamorphine (heroin) contained in any controlled drug, ... shall until the contrary is proved be presumed to have had the controlled drug in his possession for the purpose of trafficking therein. (Emphasis added.)

On 6 November 1991 (the date of the offence in *Low Kok Wai v PP* which B we shall discuss later), the said s 17 of the Singapore Act read:

Any person who is *proved to have had in his possession* more than —

(c) 2 grammes of diamorphine; ...

whether or not contained in any substance, extract, preparation or mixture C shall, until the contrary is proved, be presumed to traffic in that controlled drug. (Emphasis added.)

Thus as at 6 November 1991, the said s 17 had omitted the words 'or presumed' employed in the earlier version of the section reproduced above.

The material parts of s 18(1) and (2) of the Singapore Act D provided thus:

(1) Any person who is *proved to have had in his possession or custody or under his control* —

(a) anything containing a controlled drug; ...

shall, until the contrary is proved, be presumed to have had that E drug in his possession.

(2) Any person who is *proved or presumed* to have had a controlled drug in his possession shall, until the contrary is proved, be presumed to have known the nature of that drug. (Emphasis added.)

A comparison of s 37(da) of our Dangerous Drugs Act 1952 and s 17 of F the Singapore Act as on 6 November 1991 will reveal that in both cases to invoke the presumption of trafficking, the element of possession (to the minimum quantities as respectively stated therein) must first be proved or found. And, it is convenient to state here, in answer to the submission of the learned deputy public prosecutor, that, for the purpose of the present issue in question, there is, in our opinion, no material difference between G the words 'proved to have had in ... possession' and the words 'found in possession' used in the respective sections of the two Acts. Both necessitate a finding or proof of possession beyond reasonable doubt based on evidence.

In the Singapore case of *Low Kok Wai v PP*, the accused was charged with trafficking of no less than 29.62gm of diamorphine (a controlled drug H listed in the First Schedule to the Singapore Act) on or about 6 November 1991. The drug was found in the boot of a car rented to and driven by the accused. At the trial at the first instance, the learned trial judicial commissioner held that by virtue of s 17 of the Singapore Act in force on 6 November 1991, the accused was presumed to have the drug for trafficking I and had failed to rebut the presumption. The accused was convicted and sentenced to death. On appeal, one of the contentions on behalf of the accused was that the learned trial judicial commissioner had erred in applying s 17(c) of the Singapore Act (as in force on 6 November 1991)

A to hold that the presumption of trafficking arose against the accused when the possession had only been presumed under s 18 of the said Act and not proved. The Court of Criminal Appeal upheld the contention and held that on a proper construction of the said s 17 in force on 6 November 1991 (ie without the words 'or presumed'), the presumption of trafficking
B provided thereunder could not be applied where possession had not been proved independently but merely presumed by virtue of s 18 of the said Act. Though not relevant for our purpose, we would add, however, for the sake of completeness, that the appeal was dismissed on the ground that there was overwhelming evidence pointing to the accused being a trafficker.

C Delivering the judgment of the appellate court, Chao Hick Tin J, after tracing the legislative history of ss 17 and 18 of the Singapore Act said (at p 683F–I):

> It seems to us clear that in the Act 'proof' is different from 'presumption'. This is apparent from s 18. Subsection (1) of s 18 provides that 'any person who is proved to have had in his possession ... any keys of anything
> D containing a controlled drug ... shall ... be presumed to have had that drug in his possession'. Subsection (2) of s 18 provides that 'any person who is *proved or presumed* to have had a controlled drug in his possession shall ... be presumed to have known the nature of that drug'.
>
> The earlier version of s 17 (pre-15 February 1990) included the words 'or presumed'. By omitting those two words in the later version, Parliament
> E must have intended that the presumption of traffcking in s 17 was only to apply where a person was proved to be in possession of a controlled drug and not merely presumed to be in possession of a controlled drug. If Parliament had intended s 17 to also apply to the situation of 'presumed' possession, then it would not have deleted those two words. It is a rule of construction that a word in a statute must bear the same meaning unless the
> F context clearly otherwise requires. The word 'proved' must bear the same meaning in s 17 as in s 18. In our judgment, Parliament, by deleting the words 'or presumed', had shown abundantly that it did not intend to create a situation of triple presumption, namely, by linking ss 18(1), 18(2) and 17. (Emphasis added.)

G Having considered the submissions of counsel and the learned deputy public prosecutor, and the law applicable including the rules of construction of penal statutes, we were of the view that the word 'found' in s 37(d) must bear the same meaning as the word 'found' in s 37(da). Both require evidential materials in attaining proof thereof and are vastly different from the word 'deemed' employed in the said s 37(d).

H In our view, on the wording of s 37(da) as it stands, to read the presumption of possession (ie possession as understood in criminal law, with knowledge) provided in s 37(d) into s 37 (da) so as to invoke against an accused a further presumption of trafficking (ie presumption upon presumption) would not only be ascribing to the phrase 'found in possession'
I in s 37(da) a meaning wider than it ordinarily bears but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused. We are not unaware that, as a general principle, a statute may place the burden of proof on an accused by necessary implication and without doing so expressly. This

depends on the construction of the particular legislation. But a court should be extremely cautious and slow to infer from a statute that Parliament intended to impose on the defendant an onerous duty to prove his innocence in a criminal case. Furthermore, offences involving the trafficking of dangerous drugs are among the most serious in the criminal calendar. Any ambiguity in s 37(da) should be resolved in favour of the accused by placing the burden of proving possession of the substances involved on the prosecution.

We would further add that in so construing as we do, we see no injustice to the prosecution. In a proper case where the evidence so warrants and the amount of the dangerous drug reaches or exceeds the quantity specified in s 37(da), there is nothing to prevent a trial court from coming to a factual finding of possession as understood in criminal law, thereby attracting the presumption of trafficking under the said s 37(da) which, of course, is rebuttable.

Accordingly, we held that the learned trial judge had erred in law in using the presumption of possession under s 37(d) of the Act to invoke the presumption of trafficking under s 37(da) thereof.

In coming to the above conclusion we were fully aware of the distinguishing feature in the amendment to s 17 of the Singapore Act by the deletion of the words 'or presumed' which our s 37(da) did not experience because the two quoted words were never a part of our said subsection. However, we wish to make clear that our conclusion rested not on the legislative amendment and the case law of Singapore dealt with earlier which were no more than mere persuasive reasoning and were being used merely for illustration, but rather on the general principles of construction of statutes including that penal enactments are to be construed strictly and that words in a statute that are plain and unambiguous are to be given their plain, ordinary and common usage meaning.

Alternative submission of possession

As regards the alternative submission of the learned deputy public prosecutor that, independently of s 37(d), there was sufficient evidence of possession of the cannabis on the part of the appellant, all we need to say is that on the evidence, the learned trial judge did not make a finding of possession (ie possession as understood in criminal law) either factually or by way of inference. We, at the appellate stage, not having had the opportunity of observing the witnesses in giving evidence, did not consider it appropriate and safe to arrive at any conclusion in this regard.

Ground (4)

This ground relates to the desirability of conducting a separate exercise to determine whether the statutory presumption of trafficking under s 37(da) of the Act had been rebutted as laid down in *Mohamad Radhi bin Yaakob v PP* [1991] 3 MLJ 169. In the light of our opinion under ground (3) above which rendered s 37(da) inapplicable, we found it unnecessary to deal with this ground.

A *Conclusion*

For the above reasons, we had allowed the appeal, quashed the conviction and set aside the sentence. In substitution therefor, we convicted and sentenced the appellant as stated at the commencement of this judgment.

B *Appeal allowed, conviction quashed and death sentence substituted with a sentence of 16 years imprisonment and 10 strokes of whipping.*

Reported by David Lai

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